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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION VIII

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EPA REGION VIII
HEARING CLERK

IN THE MATTER OF:	
Layton Salvage Yard Site 365 East 2000 North Layton, Utah	**RECOMMENDED DECISION**
Site No. P7	
Marvin L. Allgood, Respondent	

I. Background

This matter was commenced by the United States Environmental Protection Agency ("EPA") by the issuance of a notice on February 14, 1994, of its proposal to perfect a lien on the property at the Layton Salvage Yard Site. EPA proposed to file the lien pursuant to Section 107(l) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9607 (l), as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 (1986) ("CERCLA). The Respondent filed a request for a hearing in this Matter on March 11, 1994. The Matter was subsequently submitted to me, pursuant to EPA guidance (Supplemental Guidance on Federal Superfund Liens, OSWER Directive Number 9832.12-1a, July 29, 1993, at 7, hereinafter "Supplemental Guidance") to conduct an informal hearing and issue a recommended decision.

The lien filing record ("LFR") in this matter, which contains the documents on which EPA relied in its proposal to file the notice of lien, was filed on May 9, 1994. At a

prehearing conference held on Tuesday, May 17, 1994, I requested that the parties submit briefs summarizing their respective positions, by June 2, 1994. Both parties submitted timely briefs which are included in the LFR. Subsequently, the parties entered into Stipulations which were filed with the Regional Hearing Clerk on June 9, 1994. An informal telephone hearing was conducted on Wednesday, June 15, 1994. The hearing was transcribed and a transcript of the hearing was filed with the Regional Hearing Clerk on June 29, 1994, and is included in the LFR.

As discussed herein, based on my review of the LFR and the statutory criteria under Section 107, I find that the LFR supports the EPA position that it has a reasonable basis to file a notice of lien under Section 107(l) of CERCLA.

II. Statement of Case

The Layton Salvage Yard ("LSY") site is located approximately one and one-eighth miles east of the town of Layton, Utah. The site has been used by Marvin Allgood and his family for open storage for salvage construction and government auction material for approximately 30 years. City of Layton inspectors entered the LSY property on May 20, 1991, for the purpose of conducting a zoning inspection and inventory. The city inspectors found four 35-gallon metal drums of material labeled as ammonium perchlorate surrounded by a large number of 1-gallon and 5-gallon containers of solvents, adhesives, lacquers, flammable paints, methyl-ethyl ketone and

trichloroethylene - hazardous materials. A label removed from one of the 35-gallon drums identified the material as ammonium perchlorate of 250 lb. weight. Material seeping from the base of one of the 35-gallon drums was identified to be a chlorine-containing oxidizer (See LFR -June 18, 1991, Action Memorandum).

On May 23, 1991, the Utah Department of Health requested assistance from EPA. The EPA Emergency Response Branch immediately responded, determined that an imminent hazard was presented by the presence of ammonium perchlorate and responded to abate the hazard. The four drums of ammonium perchlorate were subsequently removed from the property and transported to a safe location and neutralized by detonation. The On Scene Coordinator ("OCS") conducted an inventory of the remaining containers on the site. The containers holding hazardous materials were re-packaged in approved containers, and on March 26, 1992 transported to an approved disposal site. The costs incurred by the response action are documented in the LFR - See September 3, 1993 OSC report.

As set forth above, the subject notice was issued to initiate procedures to secure payment for the United States of costs and damages for which the property owner would be liable to the United States under Section 107(a) of CERCLA, 42, U.S.C. § 9607(a).

III Requirements for Lien

A. Statutory Criteria

The Statutory criteria for filing a notice of federal lien are stated in Section 107(l), 107(a), and 107(b) of CERCLA. Section 107(l) provides that a lien arises in favor of the United States when the following elements are met:

1) There are costs or damages for which a person is liable to the United States under Section 107(a) of CERCLA;

2) The property upon which the lien arises is subject to a removal or remedial action;

3) The property belongs to the person who is liable for the costs and damages; and

4) The person has been provided written notice of potential liability.

Under Section 107(a), 42 U.S.C. § 9607(a), a person is liable for costs and damages if, in relevant part, the person:

1) owns a facility from which there is a release or threatened release of a hazardous substance;

2) which causes the incurrence of response costs;

3) unless such person can establish that it is entitled to a defense under Section 107(b).

B. Discussion

One requirement for perfecting a lien is that the property must be the subject of the removal action. I find that the June 18, 1991, action memo, which is part of the lien filing record, documents that in the summer of 1991 EPA did conduct a removal action at the property which is the Layton Salvage Yard Site.

Another requirement for perfecting a lien is that costs were incurred at the site. I find that the expenditure summary, which

is part of the lien filing record, documents approximately $455,000 worth of costs that the Agency did incur at the site in connection with the removal action at the Layton Salvage Yard.

A third requirement is that the party, Marvin Allgood, must be an owner of the property. I find that in the Stipulation which EPA and the Respondent entered into on June 9, 1994, Marvin Allgood stipulated to the fact that he does own the subject property.

The fourth requirement is that EPA provide the property owner with written notice of potential liability. I find upon review of the lien filing record, that EPA provided Marvin Allgood with written notice of potential liability on June 13, 1991.

IV 107(b) Defense

Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3), provides that there shall be no liability .... for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by -

> (3) an act or omission of a third party other than an employee or agent of the defendant, or one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant ... if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took

> precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; ....

Counsel for respondent argues that Mr. Allgood meets the defense of an innocent purchaser of the material and exercised due care, and the risk, if any, was caused by a third party, the United States Air Force, from which the truck (loaded with the drums) was purchased (See p-15, of transcript of June 15, 1994, hearing), thereby invoking the 107(b)(3) defense.

Upon examining the LFR I find that the four drums of material identified as ammonium perchlorate remained on the truck for approximately 20 years without the respondent attempting to find out what the drums contained. I find it is foreseeable that any material in the drums would deteriorate within that time; and that a failure to determine the contents of the drums, over such a long period of time, was unreasonable, and a failure of the respondent to exercise due care. I therefore find that the respondent has failed to meet, at least one of, the requirements for a 107(b)(3) defense.

V <u>Release or Threatened Release</u>

The respondent argues that there was no release or threatened release of a hazardous substance. A review of the June 18, 1991, Action Memorandum (See LFR) documents the presence of four deteriorating 35-gallon drums of ammonium perchlorate (each of which contain approximately 250 lbs of material) at the site, along with containers of other hazardous materials as defined by section 101(14) of CERCLA. The courts have found that

storage of hazardous substances in deteriorating drums presents a threat of release. (See U.S. v. Mirabile, No. 84-2280, slip op. at page 7 (E.D. Pa. Sept. 4, 1985).

Upon review of the LFR and information submitted by the parties, I find that the deteriorating drums of ammonium perchlorate presented a threat of release of a hazardous substance.

VI Scope of Review

The scope of review of an EPA proposal to file a notice of lien is necessarily limited. The review is to determine whether the administrative record shows that EPA has a reasonable basis to believe that the statutory prerequisites to filing a lien have been met. The scope of the review is discussed in Reardon v. United States, 947 F.2d 1509, 1522-23 (1st Cir. 1991) and in EPA's Supplemental Guidance. The review cannot focus on the selection of the remedy or other matters which are only reviewable in a cost recovery action under Section 107, or are not subject to review. See, Section 113(h), 42 U.S.C. § 9613(h).

VII Conclusion

Upon review of the Lien Filing Record including supplemental documents and the hearing transcript, as discussed above, I find that EPA has a reasonable basis to perfect its lien.

This recommended decision does not bar EPA or the property owner from raising any claims or defenses in further proceedings. It has no preclusive effect, nor shall it be given deference or otherwise constitute evidence in any subsequent proceeding; nor

shall it be a binding determination of liability or non-liability.

September 14, 1994
Date

Alfred C. Smith
Alfred C. Smith
Regional Presiding Officer

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **RECOMMENDED DECISION** in the matter of **LAYTON SALVAGE YARD SITE** was filed with the Regional Hearing Clerk on September 14, 1994.

Further, the undersigned certifies that a true and correct copy was hand-carried to Suzanne Bohan, Attorney, Environmental Protection Agency, 999 18th Street, Suite 500, Denver, Colorado 80202-2466. A true and correct copy of the aforementioned document was sent Certified, Return Receipt requested to:

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Salt Lake City, UT 84145-0444

Joanne McKinstry
Regional Hearing Clerk

FCD: September 14, 1994.